

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In Re:

Bky. Case No. 02-42344-RJK  
Chapter 7

Linh Thi Tran,

Debtor.

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VERIFIED NOTICE OF HEARING AND MOTION  
ON TRUSTEE'S OBJECTION TO CLAIMED EXEMPT PROPERTY

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TO: Debtor; Debtor's attorney; the United States Trustee and other parties in interest.

1. Timothy D. Moratzka ("Trustee"), by its undersigned attorneys, moves the Court for the relief requested below, and gives notice of hearing herewith.

2. The Court will hold a hearing on this objection at 9:30.a.m. on August 18, 2004, in Courtroom No. 8 West, United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota before the Honorable Robert J. Kressel, or as soon thereafter as counsel may be heard.

3. Any objection to the relief requested herein must be filed and delivered not later than Friday, August 13, 2004, which is three (3) days before the time set for the hearing (excluding Saturdays, Sundays and holidays), or filed and served by mail not later than Monday, August 9, 2004, which is seven (7) days before the time set for the hearing, (excluding Saturdays, Sundays and holidays). UNLESS A WRITTEN RESPONSE IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 1334 and 157(a), Fed. R.Bankr.P.5005, Local Rule 1070-1, and applicable rules. This is a core proceeding. The petition commencing this Chapter 13 case was filed July 16, 2002. The case

was converted to a case under Chapter 7 on June 6, 2004 and the case is now pending in this Court.

5. This motion is filed pursuant to Bankruptcy Rule 4003(b) and Local Rule 4003-1 and 9013 et seq. and Trustee objects to the Debtor's claim that the following property is exempt/or not property of the estate under the applicable exemption statute:

A) 403(b) pension  
11 U.S.C. Sec. 522(d)(10)(E)  
Scheduled Value: \$7,500  
Amount Claimed Exempt: \$7,500

6. Trustee asserts the 403(b) plan is not exempt for the following reasons. The 403(b) plan is not ERISA qualified because it does not "provide that benefits under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1); *In re Van Nastrand* 183 B.R. 82 (Bky. D.N.J. 1995). The 403(b) plan is property of the estate under 11 U.S.C. § 541. The 403(b) plan assets are not necessary for support of the Debtor, or payable only on account of illness, disability, death, age or length of service and should not be exempt. It is not known if the 403(b) plan is an ERISA-qualified plan or a trust under 11 U.S.C. Sec. 541(c)(2). *See In re Adams*, 302 B.R. 535 (6<sup>th</sup> Cir. B.A.P. 2003).

WHEREFORE, Trustee respectfully moves the Court for an order sustaining the Trustee's motion to Debtor's claimed exemption listed herein and for such other relief as may be just and equitable.

Dated: July 28, 2004

MACKALL, CROUNSE & MOORE  
By /e/Patrick C. Summers  
Timothy D. Moratzka (Atty No. 75036)  
Patrick C. Summers (Atty. No. 028841X)  
Attorneys for Trustee  
1400 AT&T Tower  
Minneapolis, Minnesota 55402  
(612) 305-1400

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VERIFICATION

I, Timothy D. Moratzka, declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on: July 28, 2004

Signed: /e/Timothy D. Moratzka  
Timothy D. Moratzka

U.S. BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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UNSWORN DECLARATION  
FOR PROOF OF SERVICE

Amy J. Ditty, employed by Mackall, Crounse & Moore, attorney(s) licensed to practice law in this court, with office address of 1400 AT&T Tower, 901 Marquette Avenue, Minneapolis, MN 55402-2859, declares that on the date set forth below, I served the annexed **Verified Notice of Hearing and Motion on Trustee's Objection to Claimed Exempt Property** upon each of the entities named below by mailing to each of them a copy thereof by enclosing same in an envelope with first class mail postage prepaid and by facsimile and depositing same in the post office at Minneapolis, Minnesota addressed to each of them as follows:

Office of the United States Trustee  
1015 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
(612) 664-5516

(Attorney for Debtor)  
Michael K. Hoverson  
333 Washington Avenue North  
Suite 308  
Minneapolis, MN 55401  
Fax (612) 349-2726

(Debtor)  
Lihn Thi Tran  
15739 Cedar Ridge Road  
Eden Prairie, MN 55347

And I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: July 28, 2004

By /e/ Amy J. Ditty

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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ORDER

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The above-entitled matter came before the Court for hearing on August 4, 2004, on the motion of Timothy D. Moratzka, Trustee for the above-referenced Debtor, objecting to the exemption claim of the Debtor in the 403(b) retirement plan claimed under 11 U.S.C. Sec. 522(d)(10)(E). Appearances were noted in the Court's record. Based upon the proceedings had on said date, the statements of counsel, and all of the files and records herein, the Court now finds grounds for sustaining the Trustee's objection.

NOW, THEREFORE, IT IS HEREBY ORDERED that the 403(b) retirement plan claimed by Debtor under U.S.C. Sec. 522(d)(10)(E) is not exempt and shall be administered as property of the estate.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Honorable Robert J. Kressel  
United States Bankruptcy Judge